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BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
SHEEP MOUNTAIN CATTLE COMPANY,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB No. 81-85

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter, the appeal of a Washington State Department of Ecology Order, Docket No. 81-231, relative to relinquishment of water rights Certificate No. 3 of the Sinlahekin Creek Adjudication, came on before the Pollution Control Hearings Board, on March 2 and 3, 1982, at Wenatchee, Washington. Seated for the Board, and presiding, was Gayle Rothrock, member of the Board. The formal proceedings were electronically recorded and recorded by court reporter Joan Steichen.

Appellant was represented by Kelly Hancock, an attorney from

1 Omak. Respondent was represented by Wick Dufford, Assistant Attorney
2 General for the Department of Ecology at Olympia.

3 Witnesses were sworn and testified. Exhibits were admitted and
4 examined. Oral and written argument was taken into the record. From
5 the testimony, evidence, and argument, the Board makes these

6 FINDINGS OF FACT

7 I

8 In Okanogan County, very near the town of Loomis, in several
9 townships at Range 25 East, Willamette Meridian is a patchwork of
10 parcels under the ownership of Sheep Mountain Cattle Company, a
11 Montana corporation. The land held is used for cattle grazing,
12 orchards, alfalfa, and hay. The firm's director and principal
13 stockholder is Earl McConnell of Paulina, Oregon. Sheep Mountain
14 Cattle Company holds certain ground and surface water rights
15 appurtenant to certain of these lands. The certificated surface water
16 rights arise from the Sinlahekin Creek Adjudication.

17 II

18 Certificate No. 3 of the Sinlahekin Creek Adjudication was issued
19 under provisions of Chapter 90.03 RCW to the Spokane and Eastern Trust
20 Company on January 19, 1932, with a priority date of 1884. This
21 certificate confirmed a right to divert 2.26 cubic feet per second of
22 water from Toats Coulee Ceeek, a tributary of Sinlahekin Creek, for
23 the purpose of irrigation of 108.5 acres located by the mouth of
24 Chopaka Creek within the SW 1/4 of the SE 1/4 of Section 23 and the N
25 1/2 of NE 1/4, the N 1/2 of SW 1/4 of NE 1/4, N 1/2 of SE 1/4 of NE 1/4

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1 of Section 26, T.39 N., R. 25 E. W. M. The authorized point of
2 diversion is located within the NE 1/4 of SW 1/4 of Section 35, T.39
3 N., R. 25 E. W. M., Okanogan County.

4 Sheep Mountain Cattle Company (SMCC) is a successor in interest to
5 Spokane and Eastern Trust Company. After some intervening ownerships,
6 SMCC bought the subject lands of Certificate No. 3 in 1974 and 1975.

7 III

8 In an agreement amongst property owners (which included successors
9 to Spokane and Eastern Trust Company) and the Whitestone Reclamation
10 District, signed in 1943, permission was granted to the District to
11 furnish water from Sinlahekin Creek to three irrigation ditches, on or
12 after July 1 of each year, to be delivered to those ditches near their
13 legal points of diversion. The Certificate No. 3 point of diversion
14 on Toats Coulee Creek, which served the "Thorp ditch," is
15 approximately 1.5 miles from the District's diversion point on
16 Sinlahekin Creek.

17 The agreement states it does not alter rights certificated through
18 the Sinlahekin Creek adjudication. It also states landowners may
19 revert to their original water diversion points if the District fails
20 to deliver irrigation water to the ditches.

21 SMCC was not aware of their agreement until the time of this
22 hearing.

23 IV

24 Surface water from Sinlahekin Creek was routinely delivered by the
25 District to the farmlands appurtenant to Certificate No. 3, under each

1 of the successive ownerships, until 1966 when the then-owner ceased
2 requesting it. Thereafter, whatever irrigation the then-owner
3 (Woodard) did on the subject lands came from his groundwater sources.
4 The "Thorp ditch" became neglected. However, the more southerly
5 "Woodard ditch" (the system by which water was also carried to the
6 McDaniels property) remained useable. The District even considered
7 petitioning the Supervisor of Water Resources for a permanent
8 diversion point for the Woodard ditch on Sinlahekin Creek.

9 V

10 In February of 1974, when Sheep Mountain Cattle Company was
11 contemplating the purchase of the Woodard properties and others
12 nearby, Earl McConnell, a principal, investigated water rights by
13 asking the realtor, owner, and Federal Land Bank officials. Later, an
14 inquiry was made at the Department of Ecology about the existence of
15 class I water rights appurtenant to the Woodard property. The
16 Department advised SMCC that class I rights showed on the record, but
17 the area's water rights were very intertwined and a personal visit to
18 the Department to examine the entire record would be advisable. Earl
19 McConnell was satisfied with the telephone inquiry and his
20 conversations with Woodard about the subject, and did not then examine
21 the DOE records.

22 VI

23 SMCC's first step of its plan was to completely redo the existing
24 irrigation. This included laying underground lines for the main lines
25 and installing wheel lines to take the place of surface lines and the
26

1 old hand-set lines. The next step was to remove brush from lands
2 covered by the Certificate No. 3 water right and other lands. The
3 third step was to develop additional lands for permanent pasture,
4 irrigated hay land and/or orchard land.

5 After its purchase in 1974, SMCC completed the first step in two
6 years. At about that time in 1976, certain lands at Tunnel Flat were
7 acquired. The second step was completed in 1979. It was then that
8 SMCC's McConnell became aware of the time limit on its water right.

9 VII

10 In November of 1979 the SMCC principal, Earl McConnell, met with
11 the Whitestone Reclamation District board to apprise them of a
12 proposal he developed for irrigating lands east of Loomis (Tunnel
13 Flat) using the Whitestone Reclamation District siphon to convey some
14 water from his "right" on Toats Coulee Creek to the proposed use site
15 and the balance of the water to Chopaka Lake. He additionally sought
16 their endorsement and support in reconstructing a dam at the outlet of
17 Chopaka Lake such that SMCC and the District customers would benefit
18 from stored waters augmenting the natural flow of the Sinlahekin Creek
19 system during the annual low flow periods. Water "rights" would
20 actually only be exercised by SMCC after a hoped-for Department of
21 Ecology approval of change in place of use (Tunnel Flat) and point of
22 diversion (Chopaka Lake) of the Certificate No. 3 right. No
23 application for change of place of use or point of diversion was filed
24 with DOE, however.

The appellant indicated through McConnell and its agents that if the District did not care to agree to this agreement, SMCC would, in 1980, resume diverting water through a paved ditch directly from Toats Coulee Creek for irrigation of his lands, under authority of Certificate No. 3, to protect his right against relinquishment. This latter contemplated arrangement was an alternate plan.

During 1980 and 1981, appellant and its agents engaged in discussions with various public agencies and a representative of the Okanogan Fly Fishing Club, by letter, telephone, and in personal meetings, fleshing out details of a possible conjunctive stored water use plan for Chopaka Lake and of a Sinlahekin Creek system irrigation water withdrawal scheme. A number of unknown factors were identified including existing rights to stored water, future District needs for stored water, and the viability of the Certificate No. 3 water right.

VIII

SMCC presently irrigates about 75 to 80 acres of the lands described in Certificate No. 3 from a well. That well is authorized in ground water certificate No. G-4 23055C to irrigate lands within the W 1/2 of the SE 1/4 of Section 23, and the N 1/2 of the NE 1/4 and the N 1/2 of the S 1/2 of the NE 1/4 of Section 26, T. 39 N., R. 25 E. W. M. in Okanogan County. Neither SMCC nor its predecessor in interest, Woodard, used waters authorized under Certificate No. 3 for irrigation upon lands authorized therein from July 1, 1967, until the present.

IX

Respondent DOE reviewed available records and facts relative to the right to use public waters embodied in Certificate No. 3 of the Sinlahekin Creek Adjudication and issued an Order (DE 81-231) on May 12, 1981, declaring that the right to use public waters under the aforementioned certificate had reverted to the State and the Certificate was declared relinquished. The DOE amended the order on July 27, 1981, to correct the name of the Certificate holder from Earl McConnell to Sheep Mountain Cattle Company.

X

Feeling aggrieved by the issued Order of the Department, SMCC, through its legal counsel, filed an appeal and request for review of DE 81-231 with this Board and the matter came to formal hearing.

XI

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings the Board comes to these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over the persons and the subject matter of this proceeding. RCW 43.21B. RCW 90.14.200.

II

The Legislature has found and required that a strong beneficial use requirement is an appropriate condition precedent to the continued

ownership of a right to withdraw or divert water and that such requirement is essential to the orderly development of the state. RCW 90.14.020.

III

State law further indicates the right to the use of water which has been applied to a beneficial use in this state shall be and remain appurtenant to the land or place upon which the same is used; provided, however, that the right may become appurtenant to any other land or place of use and the point of diversion may be changed if such changes can be made without detriment or injury to existing rights. RCW 90.03.380.

The opportunity to apply for change in place of use and point of diversion has been available to SMCC and its predecessors in interest if changing circumstances suggested new land cultivation patterns. No application for change has been made.

IV

Under state law, water rights which have lain unexercised are subject to relinquishment. Any person entitled to withdraw water under an adjudicated right:

who voluntarily fails without sufficient cause to beneficially; use all or any part of said right to divert...for any period of five successive years after the effective date of this act, shall relinquish such right or portion thereof, and said right or portion thereof shall revert to the state, and the waters affected by said right shall become available for appropriation in accordance with RCW 90.03.250.

RCW 90.14.160.

1 This matter involves the application of RCW 90.14.160 to the
2 relinquishment of an adjudicated water right certificate for non-use
3 under Chapter 90.14 RCW. The Department proved the voluntary non-use
4 of the right for five successive years commencing from the effective
5 date of the statute, July 1, 1967. Therefore, the water right must be
6 ordered relinquished unless appellant presents persuasive evidence
7 which shows that the non-use of the right is excusable.

8 V

9 In the event the holder of a water right certificate can show that
10 this non-use was excused by the application of some statutory
11 exemption, a relinquishment shall not be found and the certificate
12 remains valid.

13 These exemptions include non-use occurring if:

14 ...such right is claimed for a determined future
15 development to take place either within 15 years of
16 the effective date of this act, or the most recent
beneficial use of the water right, whichever is
later...

17 RCW 90.14.140(3).

18 Appellant claims this exemption applicable to its Certificate
19 No. 3 non-use.

20 VI

21 The five year non-use provision begins running at the same point
22 that the fifteen year determined future development period does:
23 either July 1, 1967, or when water was last used, whichever is later.
24 Any interpretation otherwise would allow the five year period to be
25 easily avoided. The legislature could not have intended such an

1 interpretation. Consequently, if there was no "determined future
2 development" on July 1, 1967, for an unused water right, the five year
3 non-use provision would begin running on that date and the exemption
4 of RCW 90.14.140(3) would be inapplicable.

5 VII

6 There is no persuasive evidence of a "determined future
7 development" by appellant. "Determine" means "to come to an end."
8 Black's Law Dictionary 536 (4th ED. 1968). It is defined in Webster's
9 Third New International Dictionary 616 (1971) as "to fix conclusively
10 or authoritatively." Appellant and his representatives testified
11 about his plans to plant Tunnel Flat new orchard land, re-orient other
12 irrigated acreage, make water source trades with Whitestone
13 Reclamation District, re-establish a dam at Chopaka Lake and store
14 water while redeveloping a fly fishery in the lake, or, alternately,
15 resume diverting 2.26 cubic feet per second out of Toats Coulee Creek
16 to irrigate Certificate No. 3 lands. These intended plans are
17 somewhat inconsistent with each other and are subject to change. They
18 cannot amount to meeting the criteria of a "determined future
19 development" existing on July 1, 1967, as contemplated under
20 RCW 90.14.140(3).

21 VIII

22 The assertion, under authority of RCW 90.14.130, that DOE by
23 failing to give notice to show cause why the Certificate No. 3 right
24 should not be relinquished and by itself failing to hold a hearing in
25 this case made a procedural error in ever issuing DE 81-231 is

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1 incorrect. A full hearing before the Department is not possible. See
2 RCW 43.21B.120. ITT Rayonier, Inc., v. Hill, 78 Wn.2d 700 (1970).

3 Orders of the Department are reviewable by the Board (RCW 43.21B),
4 which includes the opportunity for hearing. Until review proceedings
5 are terminated, the Department's Orders are not final. RCW
6 43.21B.120. The procedure used in this case avoids redundancy. The
7 Departmental order serves as notice of relinquishment under RCW
8 90.14.130. A full hearing before this Board is provided with the
9 burden of proof placed upon the Department. See RCW 90.14.200. In
10 this manner, the certificate holder's full rights of review are
11 preserved.

12 Even if the procedural steps of RCW 90.14.130 prevail over the
13 teachings of ITT Rayonier, supra, other provisions in that same Act
14 compel the same result. RCW 90.14.200(2) declares that:

15 RCW 90.14.130 provides non-exclusive procedures for
16 determining a relinquishment of water rights under
17 RCW 90.14.160...and may be applied in, among other
18 proceedings, general adjudication proceedings....

19 This provision adds flexibility to the manner in which the
20 determination of relinquishment of water rights can be achieved.
21 Finally, RCW 90.14.200(1) provides for review of proceedings brought
22 under RCW 90.14.130 in accordance with chapter 43.21B RCW. Such
23 review is conducted de novo providing a certificate holder full
24 statutory and constitutional due process rights.

25 IX

26 The additional assertion that laches is a defense here is not
27 applicable since DOE's order did not upset any reasonable expectations

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1 earlier created by the Department resulting in delay-caused injury to
2 appellant SMCC. If there has been upset it was caused by appellant's,
3 or its agents, abbreviated initial investigation before purchasing the
4 various parcels of land in the mid-70's. The facts of non-use and the
5 legal consequences were discoverable then.

6 The relinquished right is lost by operation of the law on the
7 facts which exist and the facts support relinquishment of Certificate
8 No. 3.

9 The fact that proceedings to relinquish the right have not been
10 brought shortly after the initial five year non-use period had run
11 does not revive the right in this case. Relinquishment proceedings
12 simply confirm the loss, much like a property right lost through
13 adverse possession is, although the proceedings and standards differ.
14 The point is that the manner of proceedings under chapter 90.14 RCW
15 are not without precedent in other areas of law.

16 X

17 Under the laws of the state, special publicity was not required
18 for the non-use provisions of RCW 90.14, enacted in 1967. The
19 department simply explains the provisions to people who inquire about
20 their or others certificated water rights. Special publicity was
21 required of the claims registration provision of the statute.
22 RCW 90.14.101. This latter device was created in order to advise
23 people of the consequences of a failure to register. Such
24 consequences, however, did not apply to holders of state-issued
25 certificates (e.g. Certificate No. 3 of the Sinlahekin Creek

1 Adjudication) and therefore, there wasn't any reason to give them such
2 notification.

3 XI

4 Constitutional issues raised by appellant, SMCC, are not within
5 the province of the Board to decide. They are not treated here.

6 XII

7 Any Finding of Fact which should be deemed a Conclusion of Law is
8 hereby adopted as such.

9 From these Conclusions the Board enters this

10 ORDER

11 Washington State Department of Ecology Order DE 81-231 (First
12 Amendment) is affirmed. Certificate No. 3 of the Sinlahekin Creek
13 Adjudication is relinquished.

14 DATED this 13th day of January, 1983.

15 POLLUTION CONTROL HEARINGS BOARD

16
17 
18 GAYLE ROTHROCK, Chairman

19 
20 DAVID AKANA, Lawyer Member